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FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	:	**LON/00AY/OLR/2017/1175**
Property	:	**Flat 5, 7 Cottesloe Mews, London, SE1 4RU**
Applicant as to costs	:	**Chi Yee 'Cherie' Tong**
Represented by	:	**Cubism Law**
Respondent as to costs	:	**Proxima GR Properties Limited**
Represented by	:	**Estates & Management Limited**
Type of application	:	**Application for costs under Rule 13 of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013**
Tribunal member	:	**Mrs. H. Bowers (Chairman)MRICS**
Date of decision	:	**5 February 2018.**

DECISION

- The Tribunal determines that no costs are awarded under Rule 13.

REASONS

BACKGROUND:

1. This matter initially arises from an application made by the Applicant, Chi Yee 'Cherie' Tong, as the leaseholder of Flat 5, 7 Cottesloe Mews, London, SE1 4RU (the subject property). The original application was dated 31 August 2017 and received by the Tribunal on 5 September 2017 and was for a determination of the premium or other terms of acquisition for a lease extension under section 48 of the Leasehold Reform, Housing and Urban Development Act 1993 (the Act). The Respondent, Proxima GR Properties Limited, is the landlord under the lease.

2. By correspondence dated 9 November 2017 both parties confirmed that all the terms of the new lease were agreed but there remained an outstanding application for costs under Rule 13 of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 (the Rules). Directions in respect of this application were issued on 16 November 2017. The Directions indicated that the application would be considered on the written submissions of the parties unless either party requested a hearing. There was no request for an oral hearing and therefore this matter was determined on the papers submitted by the parties.

3. The costs being sought are £1,500.00 plus VAT for legal costs (5 hours at £300 per hour); £330.00 plus VAT for the valuer's time (1.5 hours at £220 per hour) and the application fee of £100.00 giving a total of £2,296.00.

4. Both parties have provided a chronology that explains that the Initial Notice under section 42 of the Act was served on 28 March 2017, the Counter-Notice was served on 25 May. On the 8 August 2017 the Applicant sent a Calderbank letter that enclosed a draft deed for approval. On 25 August the Respondent replied to the Calderbank letter stating that they were unwilling to accept the offer. The Applicant further corresponded on 29 and 30 August 2017. The application was made to the Tribunal with a covering letter on 4 September 2017. On 5 October 2017 the terms of the acquisition were agreed.

THE LAW

5. Rule 13 of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 is set out in the Appendix to this decision.

APPLICANT'S CASE:

6. It is submitted that the Respondent acted unreasonably in 'conducting proceedings' and that conducting proceedings includes a party's conduct prior to an application being made to the Tribunal. If this was

not the correct interpretation of Rule 13(1)(b), then it would make a nonsense out of the duty to strive to avoid proceedings and encourage the parties to take a pre-application position that could in 'good faith' be maintained after the application. It is suggested that this position is accepted in the decision of *Willow Court Management Company (1985) Limited v Alexander and others [2016] UKUT 290 (LC)* (Willow Court), in particular at paragraph 95. The conduct complained of was that the Respondent had no-one available to discuss the valuation aspects by phone; they would not move on the point of wording of 'family' in the new lease and provided no reason for their position; they would not provide a draft lease and would not respond to one when it was provided by the Applicant. An offer was made to the Respondent that was accompanied by a costs warning. The offer was rejected although the same terms were agreed and the draft lease was easily agreed immediately after the application to the Tribunal. The Respondent has been professionally represented and the Applicant has paid section 60 costs in relation to the Respondent's costs, which are required to be reasonable. Although the Respondent had suggested that the original application was premature it is submitted that this made no sense as settlement was reached just after the application and that the Respondent had declined to comment on the draft lease prior to the application, saying that it was too early. It is claimed that the Respondent took a deliberate and unsustainable position prior to the application that subsequently changed and the Respondent indulged in this behaviour to either delay matters, hope that the Applicant failed to make the application, put the Applicant to additional expense and inconvenience and that the Respondent believed they were within their rights. It is suggested that there was no genuine disagreement and that it was unreasonable to delay settlement.

7. It is suggested that the Respondent's position as indicated in correspondence, was that in relation to the pre-application conduct that *"The un/reasonableness of any parties conduct is totally irrelevant"*.

8. In relation to the Respondent's position that they would not engage in dealing with the draft lease until all the other terms have been agreed, this may mean that a standard direction of the Tribunal is wrong.

9. The conduct of the Respondent is at the 'grave end' of the scale of conduct as there is no justification as to the approach taken by the Respondent.

10. The Tribunal has discretion as to how it can consider such applications. The exercise of this discretion can send out a message as to how negotiations should be conducted in the future in response to 'good' Calderbank offers. This would have a positive impact on Tribunal resources, expedite matters and promote parliamentary intentions. If the Tribunal does not make an order for costs this will encourage parties to act in an irresponsible and unreasonable manner in pre-

application conduct. The low level of costs incurred does not affect the principle as to the issue of reasonableness.

11. It is submitted that the conduct in the Willow Court case was relatively minor in comparison to the conduct in the current case. Various principles were extracted and distinctions made in respect of Willow Court. This included whether there was a reasonable explanation for the conduct; that there is a different expectation as to reasonableness when a party has professional representation; this case was not borne from a 'fraught or emotional' scenario as there was professional advice and the Respondent was given a costs warning; that case management should be undertaken to 'encourage preparedness and co-operation'. In considering the principle that parties should not be deterred from withdrawing their claims due to potential costs implications, it is submitted that the current case can be distinguished as the Applicant brought a 'perfect claim' because the Respondent refused to see the merits of the position prior to the application. As to the issue of causation it is stated that in this case the refusal of the Calderbank offer resulted in the making of the application and the consequential work. In contrasting the current case to the scenario of the first appeal in the Willow Court case, it is suggested that in this case the Respondent did not have an arguable position as it conceded the issues within days of the application. It is submitted that the unrealistic position taken by the Respondent was analogous to lying to the Tribunal in that it was wasteful and irresponsible. Paragraph 103 of the Willow Court decision suggests that when considering reasonableness, the position taken in the negotiations can be taken into account. In the third appeal in Willow Court a claim that is fanciful and is known that it will fail, purely to cause expense and inconvenience, was regarded as unreasonable conduct and this is similar to the position taken by the current Respondent.

RESPONDENT'S CASE:

12. The Respondent's position is that no order for Rule 13 costs should be made as none of the matters that the Applicant complains of are unreasonable acts of "*bringing, defending or conducting proceedings*" and that in any event the matters complained of do not justify the Tribunal exercising its discretion. It is submitted that actions prior to the commencement of the proceedings are beyond the scope of Rule 13.

13. Reference was made to paragraphs 27-30 of the Willow Court decision, which suggests a staged approach for the consideration of Rule 13 applications. First are the actions complained of unreasonable which is to be established by applying an objective standard. If that is established then the Tribunal needs to exercise its discretion in deciding whether or not an order for costs should be made and the final stage is if the Tribunal decides to make an order, what should be the terms of the costs order. In one of the appeals considered in Willow Court it was commented that "*only behaviour related to the conduct of the proceedings themselves may be relied on at the first stage of the*

rule 13(1)(b) analysis". This is qualified in two respects, the first is that sometimes it may be relevant to consider a party's motive in bringing proceedings, but this is further qualified by the Upper Tribunal that an "*unjustified dispute over liability has given rise to the proceedings cannot in itself, we consider be grounds for a finding of unreasonable conduct*". Secondly once unreasonable conduct has been established (presumably after the commencement of proceedings) then it would be appropriate to look at the wider conduct of the party, which may include actions prior to commencement.

14. Reference is made to Primeview Developments v Ahmed [2017] UKUT 57 (LC) and Dougall v Barrier Point RTM Company [2017] UKUT 207 (LC). Suggesting that both cases confirmed the principle that in general only actions in the bringing, defending or conducting of proceedings should be taken into account when considering unreasonable behaviour and not pre-action conduct.

15. Responding to the specific conduct complained of by the Applicant that the Respondent did non accept the Applicant's offer of 8 August 2017, it is submitted that this is pre-action conduct. As to the fact that the Respondent was represented and the Applicant paid those costs, it is stated that no relevant conduct was disclosed.

16. In relation to an email dated 25 October 2017 from the Respondent stating that the application was premature is accepted to be post application conduct, but it is explained that the Applicant had until 25 November 2017 to make the application but had made it nearly two months prior to that date, this is an expression of the situation and not unreasonable conduct; comments by the Respondent in the email of 25 October 2017 about the relevance of reasonableness is accepted to be post application conduct, it is explained that the email was written by a transactional lawyer who did fully appreciate the provisions of Rule 13. However, it is also explained that this was an expression of a view rather than unreasonable behaviour. It is further noted that the email exchange of 25 October was after the terms of the acquisition had been agreed and as such it is arguable whether it was conduct in relation to the "*bringing, defending or conducting*" proceedings as essentially the proceedings had been concluded.

17. In relation to the claim that the Respondent had asserted a right to withhold from corresponding about the draft lease until all the other terms were agreed or determined, the Respondent assumes that this is a reference to an email of 18 September 2017. The Respondent refers the Tribunal to the actual email. The email makes reference to the paragraph 7(1) of Schedule 2 to the Leasehold Reform (Collective Enfranchisement and Lease Renewal) Regulations 1993/2407, which states that "*The landlord shall prepare a draft lease and give it to the tenant within the period of fourteen days beginning with the date the terms of acquisition are agreed or determined by [the appropriate tribunal (as defined in section 38)]*". It is submitted that the approach described by the Respondent in the email is correct and that the

expression of this view is not unreasonable behaviour. Even of the Tribunal was to direct that a draft lease is produced, this does not make the view expressed unreasonable.

18. Other that the issues considered above the Respondent states that the Applicant did not disclose any other aspects of conduct, but made submissions and speculated as to the Respondent's motive.

19. In respect of the Respondent's defence or conduct of the proceedings, it is suggested that other than the email of 18 September 2017, the Applicant has not put forward any criticism. There was no unreasonable behaviour and as such the application should be dismissed.

20. As to the Tribunal's discretion, the Respondent's conduct would not justify the Tribunal exercising its discretion. In responding to the Applicant's claim that the conduct complained of was "*at the grave end of the scale*", this is denied and that there is little if anything that the Respondent has done that would merit the Tribunal exercising its discretion. As to the Applicant's submission that the Tribunal should send a message/signal about pre-action behaviour, the Respondent states that the Tribunal's primary consideration is post application conduct. Also that if the parliamentary intentions were as suggested, then the wording of Rule 13 would not have been so restricted.

21. As to the level of costs claimed, the hourly rate of £300 is excessive and the use of a City law firm when the property was located in Elephant and Castle was unnecessary. A more appropriate rate would be £150 per hour. As the application was dated 4 September and ended a month later on 5 October with limited communications during the period, then no more than 1.2 hours should be allowed for 'attendance on opponents'. Regarding 'attendance on others', it is presumed this relates to the drafting of the application. This is a straightforward document and should only take 30 minutes to complete and as such only 0.5 of an hour should be allowed. In respect of the £330 for the valuation expert, it is submitted that these are not costs consequential upon the conduct complained of and that the Applicant would have incurred a valuation fee in any event.

DETERMINATION:

22. The approach the Tribunal should take is the three-staged approach as suggested in Willow Court. The first stage is to consider whether there has been any unreasonable conduct on the part of the Respondent.

23. The Tribunal agrees with the Respondent that the conduct to be considered is the post application conduct, unless there is evidence of conduct prior to the application that could be seen as unreasonable in the sense of the motives behind such conduct. There is no evidence that the Respondent acted in an obstructive mode prior to the application or

had a particularly objectionable motive. It conducted negotiations and took a position that it was entirely entitled to take, even if it subsequently changed its mind and agreed with the Applicant and settled on the terms that the Applicant offered. This sort of application is different from other applications made to the Tribunal and even to County Court claims that may be subject to a more rigorous cost regime that the Tribunal. This type of application has to be made to the Tribunal as a protective measure and it is quite common and quite normal that after an application, negotiations will continue. This does not make the conduct of the parties unreasonable. It is also noted that the application was made before the relevant time limits expired. It is possible that if there had been a delay in making the application, then the negotiations could have successfully concluded without the application.

24. One aspect that the Tribunal wishes to note is that the Applicant makes much of the Respondent's position in respect of the wording in the draft lease and the substitution of 'family' with 'household', stating that its position was unreasonable. Yet the Act provides that the new lease is to be essentially on the same terms as the old lease subject to term, rent and any amendment to terms as provided under section 57, or unless otherwise agreed between the parties. As such the negotiating stance taken by the Respondent is not unreasonable.

25. As mentioned above the parties are fully entitled to enter into negotiations and express opinions to achieve the best result, even if some of those positions are somewhat optimistic. This is not conduct in itself that is unreasonable. Overall the Tribunal cannot identify any behaviour on the part of the Respondent that is unreasonable behaviour in defending or conducting the proceedings and any actions prior to the application that would indicate an undesirable motive.

26. Given that the Tribunal found no unreasonable behaviour it was not necessary to go to the second or third stage as set out under Willow Court.

Name: ***Helen Bowers*** **Date: 5 February 2018**

ANNEX - RIGHTS OF APPEAL

1. If a party wishes to appeal this decision to the Upper Tribunal (Lands Chamber) then a written application for permission must be made to the First-tier Tribunal at the Regional office, which has been dealing with the case.

2. The application for permission to appeal must arrive at the Regional office within 28 days after the Tribunal sends written reasons for the decision to the person making the application.

3. If the application is not made within the 28 day time limit, such application must include a request for an extension of time and the reason for not complying with the 28 day time limit; the Tribunal will then look at such reason(s) and decide whether to allow the application for permission to appeal to proceed despite not being within the time limit.

4. The application for permission to appeal must identify the decision of the Tribunal to which it relates (i.e. give the date, the property and the case number), state the grounds of appeal, and state the result the party making the application is seeking.

APPENDIX

The Tribunal Procedure (First-tier Tribunal)(Property Chamber) Rules 2013

13.— Orders for costs, reimbursement of fees and interest on costs

(1) The Tribunal may make an order in respect of costs only—
(a) under section 29(4) of the 2007 Act (wasted costs) and the costs incurred in applying for such costs;
(b) if a person has acted unreasonably in bringing, defending or conducting proceedings in—
(i) an agricultural land and drainage case,
(ii) a residential property case, or
(iii) a leasehold case; or
(c) in a land registration case.
(2) The Tribunal may make an order requiring a party to reimburse to any other party the whole or part of the amount of any fee paid by the other party which has not been remitted by the Lord Chancellor.
(3) The Tribunal may make an order under this rule on an application or on its own initiative.
(4) A person making an application for an order for costs—
(a) must, unless the application is made orally at a hearing, send or deliver an application to the Tribunal and to the person against whom the order is sought to be made; and
(b) may send or deliver together with the application a schedule of the costs claimed in sufficient detail to allow summary assessment of such costs by the

Tribunal.
(5) An application for an order for costs may be made at any time during the proceedings but must be made within 28 days after the date on which the Tribunal sends—
(a) a decision notice recording the decision which finally disposes of all issues in the proceedings; or
(b) notice of consent to a withdrawal under rule 22 (withdrawal) which ends the proceedings.
(6) The Tribunal may not make an order for costs against a person (the "paying person") without first giving that person an opportunity to make representations.
(7) The amount of costs to be paid under an order under this rule may be determined by—
(a) summary assessment by the Tribunal;
(b) agreement of a specified sum by the paying person and the person entitled to receive the costs (the "receiving person");
(c) detailed assessment of the whole or a specified part of the costs (including the costs of the assessment) incurred by the receiving person by the Tribunal or, if it so directs, on an application to a county court; and such assessment is to be on the standard basis or, if specified in the costs order, on the indemnity basis.
(8) The Civil Procedure Rules 1998, section 74 (interest on judgment debts, etc) of the County Courts Act 1984 and the County Court (Interest on Judgment Debts) Order 1991 shall apply, with necessary modifications, to a detailed assessment carried out under paragraph (7)(c) as if the proceedings in the Tribunal had been proceedings in a court to which the Civil Procedure Rules 1998 apply.
(9) The Tribunal may order an amount to be paid on account before the costs or expenses are assessed.